

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2008 Session

SAM L. HULL v. STUART THOMAS HOOD, ET AL.

**Appeal from the Chancery Court for Fentress County
No. 05-34 Billy Joe White, Chancellor**

No. M2007-02836-COA-R3-CV - Filed May 29, 2009

Landowner, who brought suit against adjoining property owners to recover for trespass, conversion of property and damages for removal of timber on his property, appeals the trial court's determination of common boundary line between the parties' property and dismissal of claims related to removal of timber. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

C. Douglas Fields, Crossville, Tennessee, for the appellant, Sam L. Hull.

James Frank Wilson, Wartburg, Tennessee, for the appellees, Stuart Thomas Hood and Ellen Hood.

MEMORANDUM OPINION¹

Plaintiff originally filed suit in the Circuit Court for Fentress County against the owners of adjoining property and others who were cutting timber from the defendants' land, alleging that the defendants were trespassing on his land and converting his property to their use and that he was entitled to damages for the timber which had been removed. The adjoining landowners filed an answer admitting that they had contracted with other defendants to remove the timber, but denied that they entered on plaintiff's land or that any timber was removed from his land; by counterclaim, defendant property owners sought to have the court fix the location of the parties' common boundary

¹ Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

line. By agreement of the parties, the case was transferred to the Chancery Court for Fentress County for disposition. The parties subsequently agreed to bifurcate the action, so as to try the issues relating to the location of the boundary line first, reserving all other issues.

A trial was held on May 22, 2007, as a result of which the court entered an order decreeing the boundary line as testified to by Timothy Goad, a surveyor who testified on behalf of defendants, and holding that the establishment of the boundary line resolved the issues raised by plaintiff against the other defendants. Plaintiff appeals, contending that the evidence does not support the trial court's determination. Finding that the evidence does not preponderate against the trial court's findings, we affirm the judgment.

I. Discussion

This case was tried without a jury; consequently, our review of the trial court's findings of fact is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). Our review of the trial court's determinations regarding questions of law is *de novo* with no presumption of correctness. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); Tenn. R. App. P. 13(d).

Plaintiff's property (the "Hull property") is composed of two tracts and lies to the north and east of defendants' property (the "Hood property"), which is also composed of two tracts. The area at issue in the suit is located at the northeast portion of the Hood property (the southwest portion of the Hull property). The common boundary line to be established in the case is the northern boundary of the Hood property (southern boundary of the Hull property). The property is in a wooded, hilly area of the county.

Both plaintiff and defendants had the property surveyed. The surveyors agreed that the boundaries could not be determined from the property descriptions in the deeds to the respective properties and that reference to other evidence was necessary. Both testified that they surveyed each parcel of both plaintiff's and defendants' land and that, in performing their respective surveys, they made reference to the original deeds, tax maps, trees and other natural markers, as well as rocks and trees which had been painted various colors. In his survey, Mr. Goad began at a point used as a starting point and proceeded northward and westward, following yellow lines, some of which had been painted over with gray paint. Mr. Foy testified that his survey was based in part on where he was told plaintiff's line was, as well as a line which had been painted red. The difference between the two surveys is that Mr. Goad's survey follows a yellow and gray line while Mr. Foy's survey follows a red line; the northernmost part of the Goad line is to the north of the northernmost part of the Foy line.

Plaintiff testified that his mother bought the 75 acre tract of the Hull property in June 1987² and that he acquired an adjoining 30 acre tract in 1992; he identified the boundaries of the two tracts

² A cemetery in which members of the Hood family were buried was reserved on this tract.

by reference to an old rail fence, trees and tree lines, the Obey River and various rocks. There had been disagreement about the boundaries since the tracts had been in the Hull family and that he had taken measures to mark the boundary, including putting in steel posts and painting the line in orange paint. Mr. Foy testified that, in performing his survey, he used the descriptions in the deeds as well as “anything that I could possibly find that I thought would enter into anything, we located that physically and then put it on this plat.” He located the yellow line, the orange line, the old rail fence, large trees, the timber lines and steel posts, all of which were platted on his survey. There was also testimony from persons who, over the years, had cut timber on the disputed acreage.

Testimony on behalf of defendants was that the boundary line of the larger tract of the Hood property was painted yellow in 1986 by Layton Hood, husband and father of two of the defendants, along with others; that sometime thereafter plaintiff’s predecessor in title painted over the line in gray; and that, rather than get into a confrontation with their neighbor, the Hood family monitored their neighbor’s timbering to insure he did not timber on their land. There was also testimony that timbering activities took place on the Hull property prior to 1986, with the activity stopping at the line which was later painted yellow. Stuart Thomas Hood, one of the defendants, testified that he was the son of Layton Hood, deceased, and defendant Ellen Hood and that he, along with his father and his father’s cousin, Johnny Hood,³ went to the property in 1986. They were accompanied by several other persons who were familiar with the property from having lived in the area for many years and who knew where the boundaries were. They located the corners of the Hood property and marked the land by ribbons, which were subsequently replaced by yellow paint. Mr. Travis Fowler and Mr. Andy Potter testified that they were part of the group who went to the property and located the various points of the boundary on the Hood property as pointed out by Johnny Hood, which were later painted yellow.

The trial court adopted the description of the common boundary line between the Hull property and the Hood property as surveyed and testified to by Timothy Goad, surveyor. In making the determination, the court noted:

I think Mr. Foy [plaintiff’s surveyor] did an outstanding job, and I don’t know as I’ve ever seen a better job by a surveyor, in that he surveyed it and said, “Here’s what’s out there.” He had no opinion where this line was and, frankly, said, I can’t survey any of the deeds, but here is everything out there. Here are the trees that are marked with the names, initials. Here’s the rail fence. Here are the marks on the bluff, and that’s all a good surveyor, really, under his – about all he could do, and he did a good job at that.

³ Johnny Hood, deceased at the time of trial, was born in 1901 and was raised on the larger tract of the Hood property, known as the Hood Town tract.

. . . I have to look at the evidence and determine what I consider to be the preponderance. And the preponderance is not huge on either side, but there – I think there is a preponderance in the evidence.

And this court is impressed and holds that the determinative proof is the testimony concerning the old men who went out on the bluff, Tommy Hood and Andy Potter and -- or Johnny Hood, and marked these two boundaries.

If those two corners are where they said they were, then the Plaintiff can't win. That's outside of where he says the boundaries are. So I think all the evidence that was put out, that that's the most certain. And I acknowledge that there's a piece of rail fence, and those initials on the trees and those things, but this Court is going to hold that the Goad survey is the proper survey by a preponderance of the evidence.

We have reviewed the evidence and, while it is conflicting, do not find that the evidence preponderates against the trial court's findings.

Plaintiff also asserts that the boundary line he proposed was established by acquiescence of Layton Hood, citing statements that Mr. Hood made when discussing the boundary line issue with plaintiff to the effect that Mr. Hood was "tired of fooling with it. . . It ain't worth fighting over. Leave me alone and don't bother me no more."

Plaintiff correctly notes that boundaries can be established by acquiescence. *See Franks v. Burks*, 688 S.W.2d 435 (Tenn. Ct. App. 1984).⁴ The proof relied upon by plaintiff, however, fails to show an agreement or acquiescence by defendants' predecessor in title to the location of the boundary line. To the contrary, the evidence shows acts on the part of both plaintiff and defendants' predecessor which are contrary to such a finding.

II. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. The case is remanded to the Chancery Court for Fentress County for collection of costs accrued therein.

Costs of this appeal are taxed to Sam Hull, for which execution may issue if necessary.

4

"An unascertained or disputed boundary line dividing the lands of adjoining property owners may be established by a parol agreement between the landowners, and the agreement does not fall within the statute of frauds. . . . Such an agreement may be shown as well by circumstances and recognition as by direct evidence of a formal agreement where the parties have acted thereon." 688 S.W.2d at 438 (citations omitted)

RICHARD H. DINKINS, JUDGE